

COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 United States Petition for Writ of Certiorari Court of Appeals No. 25CA110 Opinion by Judge Kuhn Fox and Sullivan, JJ., concur	DATE FILED July 23, 2026 6:44 PM FILING ID: EB36728D419DF CASE NUMBER: 2026SC406
Petitioners: Feet Forward - Peer Supportive Services and Outreach d/b/a Feet Forward, a nonprofit organization; Jennifer Shurley; Jordan Whitten; Shawn Rhoades; Mary Faltynski; Eric Budd; and John Carlson; v. Respondents: City of Boulder and Maris Herold, Chief of Police for the City of Boulder.	
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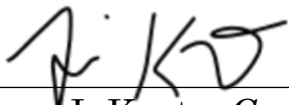
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PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Writ of Certiorari complies with all the requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Pursuant to C.A.R. 53(f)(3), Petitioners have filed a motion to exceed the word limit in C.A.R. 53(f)(1). The undersigned certifies that the brief contains 4,797 words.



Anna I. Kurtz, *Counsel for Petitioners*

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ISSUES PRESENTED¹

(1) Whether laws banning the public use of minimal shelter from the elements plausibly violate the Colorado Constitution as applied to unhoused residents in circumstances that effectively criminalize their status, banish them from every public space in a city, and endanger their lives.

(2) Whether, absent existing Colorado appellate authority construing a state constitutional provision more broadly than its federal counterpart, Colorado courts must follow in lockstep with a federal decision that sharply retrenches individual rights, here *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024), rather than engage in the independent analysis this Court commanded in *People v. Young*, 814 P.2d 834 (Colo. 1991).

¹ These issues are preserved, *see* Op. Br. 9-38, and present questions of law this Court reviews *de novo*.

JURISDICTION

This petition seeks review of the court of appeals' opinion in No. 25CA0110, *Feet Forward v. City of Boulder*, 2026 COA 37 (May 14, 2026). This Court has jurisdiction under Colo. Const. art. VI, §§1-2 and C.R.S. §13-4-108. No party sought rehearing. On June 23, 2026, this Court granted a 28-day extension, through July 23, 2026, to file this petition.

PENDING CASES

Petitioners are not aware of any pending case in which this Court has granted review of the issues presented.

STATEMENT OF THE CASE

Fiction always is a poor ground for changing substantial rights.

-Haddock v. Haddock, 201 U.S. 562, 630 (1906)
(Holmes, J., dissenting).

This case presents an issue of first impression: whether, under the Colorado Constitution, a city that bans sheltering oneself outdoors with anything beyond one's clothing may criminally punish residents who have no meaningful choice but to violate those bans, particularly during dangerous weather, because they are involuntarily unhoused.

At issue are two City of Boulder ordinances— B.R.C. §5-6-10 (the “Blanket Ban”) and B.R.C. §8-3-21(a) (the “Tent Ban”). The Blanket Ban makes it a crime to “reside or dwell temporarily” in public and conduct “activities of daily living, such as eating or sleeping” while using “any cover or protection from the elements other than clothing.” B.R.C. §5-6-10(d). The Tent Ban makes it a crime to “erect or use any tent, net, or other temporary structure for the purpose of shelter or storage of property” on public property. B.R.C. §8-3-21(a). Violating either

ordinance is punishable by up to a \$2,650 fine, ninety days in jail, or both. B.R.C. §5-2-4(a).

Respondents designed the ordinances to target unhoused residents' presence in Boulder's public spaces, and they enforce them accordingly. CF, pp.12, 56, 187, 269. Unhoused residents were the defendants in 92% of criminal cases filed under the ordinances in Boulder Municipal Court from January 2020 through 2022, even though they make up roughly 1% of the City's population. CF, p.12.

At the same time, many people experiencing homelessness in Boulder have nowhere to go *inside*. CF, pp.17-21. At night, indoor shelter capacity cannot accommodate the number of people who need it, while program rules, restrictions, and other barriers exclude people from accessing the limited shelter that exists. CF, p.5. During the day, Boulder offers most unhoused adults no indoor shelter at all. CF, pp.9, 22, 280.

By criminalizing the unavoidable trappings of extreme poverty, the ordinances penalize unhoused residents' existence in any of the City's public spaces at any hour. CF, p.2. Respondents enforce the ordinances

without regard to whether indoor shelter is available or whether the weather makes the prohibited items essential to survival, including when the temperature is below freezing. CF, pp.13, 20, 272.

There are thus times when many of the unhoused residents who call Boulder home have no place in the City where they can lawfully be. CF, p.24. And that is largely the point. CF, p.2. Officers enforcing the ordinances tell those they move along and ticket to “get out of Boulder.” CF, pp.2, 14, 18, 20.

Petitioners—housed and unhoused residents of Boulder and a local nonprofit—challenged Respondents’ enforcement of these ordinances under the Colorado Constitution. The lawsuit is not a facial challenge and does not question the City’s power to reasonably regulate public space. Instead, it asserts that the ordinances are unconstitutional as applied to people who are involuntarily unhoused; the Tent Ban only when an enclosed tent or similar structure is necessary to avoid immediate danger from the elements. CF, pp.12-14, 23.

Petitioners challenge Respondents’ ability to force involuntarily unhoused residents either to face the elements unprotected, face criminal

sanction, or leave. Respondents unconstitutionally punish the status of homelessness (cruel and unusual punishment; art. II, §20); actively endanger lives (due process; art. II, §25); and banish those deemed undesirable from public space (inalienable rights; art. II, §3). CF, p.2.

The district court initially dismissed all claims but one: that the Blanket Ban, as applied, violates article II, section 20's prohibition on cruel and unusual punishment. CF, pp.210-44. Because the case raised an issue of first impression under state law, the court looked to federal authorities for guidance. It first catalogued U.S. Supreme Court cases firmly establishing that the Eighth Amendment places "substantive limits on what can be made criminal and punished as such," CF, p.225 (quoting *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)), and forbids criminalizing status, CF, pp.226-27 (citing *Robinson v. California*, 370 U.S. 660 (1962)). Next, the district court considered lower federal court authority applying those precedents to laws like Boulder's. In the leading cases at the time, *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 674 (2019), and *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022), the Ninth Circuit held that the Eighth

Amendment forbids criminalizing homeless individuals for sleeping outdoors with minimal protection from the elements when no shelter is available to them. 920 F.3d at 603. Applying *Robinson* and its progeny, it reasoned that doing so unconstitutionally punishes conduct that is “inseparable from status.” *Id.* at 616-17.

Because the complaint alleged in “extensive detail” the individual plaintiffs’ inability to access indoor shelter, the court permitted the section 20 claim to move forward based on their “status as involuntarily unhoused.” CF, p.234.

That was until the district court stayed the case pending the U.S. Supreme Court’s decision in *Grants Pass v. Johnson*, 603 U.S. 520 (2024). CF, pp.536-44.

In *Grants Pass*, the Court ruled 6-3 to overturn the Ninth Circuit in an opinion that “dramatically weakened, and potentially eroded, Eighth Amendment-based substantive limits on criminal laws.”² The Court held that ordinances criminalizing sleeping in public forbid

² *Eighth Amendment–Cruel and Unusual Punishment Clause–City of Grants Pass v. Johnson*, 138 Harv. L. Rev. 375 (2024).

conduct, not the status of being homeless. *Id.* at 546. Three justices dissented, protesting that punishing people with no access to shelter for sleeping outside “punishes them for being homeless” and that “[s]leep is a biological necessity, not a crime.” *Id.* at 563-64 (Sotomayor, J., dissenting).

The district court applied *Grants Pass* to dismiss the complaint in its entirety. Nothing in Colorado law had changed. Nor did the district court suggest it found *Grants Pass* persuasive as to the meaning of article II, section 20. On the contrary, it believed “[d]isagreement with *Grants Pass*” was “not a proper basis for the Court’s decision”; that it did not matter “whether *Grants Pass* was correctly decided.” CF, p.728. Because it could “discern[] no Colorado appellate authority providing it with the discretion to interpret Art. II, §20 more broadly than the Eighth Amendment,” the court concluded it had to follow the federal rollback of rights. CF, p.789.

The court of appeals affirmed. *Feet Forward v. City of Boulder*, 2026 COA 37. Like the district court, the court relied on *Grants Pass* to reject Petitioners’ cruel and unusual punishment claim on the basis that this

Court had not previously interpreted article II, section 20 to provide greater protection than the Eighth Amendment. *Id.* ¶¶ 25-36.

It rejected Petitioners’ article II, section 3 claim—which asserted a violation of the fundamental right to access the public streets without interfering with the rights of others, recognized by this Court in *People in the Interest of J.M.*, 768 P.2d 219 (Colo. 1989)—by recasting it as an assertion of “a fundamental right to shelter in public” and upholding the ordinances as rationally related to policy justifications asserted in Respondents’ briefing, even though they contradict the complaint.

Finally, it rejected Petitioners’ narrow state-created danger claim—which asserted that Respondents violate article II, section 25 when they enforce the ordinances in conditions when the prohibited cover is necessary to avoid immediate danger from the elements—solely because the danger alleged, which Respondents know can be lethal, is not caused by a third-party private actor. *Id.* at ¶ 71.

ARGUMENT

I. This petition presents important issues of first impression that will otherwise evade review while impacting thousands of Coloradans and cities statewide.

Last year, 53,776 people experienced homelessness in Colorado; 16,687 on a single night in January.³ It was the state's coldest January in more than a decade.⁴ The night of the count, the temperature in Boulder fell to ten degrees, and six inches of snow covered the ground.⁵ The shelter was turning people away for lack of capacity.⁶

Under Boulder's bans, those without access to shelter that night had to choose: face the snow uncovered, face a criminal citation, or leave. That is not a choice. It is punishment for surviving. It is banishment for being poor.

³ Colorado's State of Homelessness Report (2025), <https://www.cohmis.org/soh2025>.

⁴ Colo. Climate Center, January 2025 Colo. Monthly Climate Summary, <https://spl.cde.state.co.us/artemis/ucsuserials/ucsu61012internet/ucsu61012202501internet.pdf>.

⁵ Daily Data, Boulder, CO (Jan. 25, 2025), <https://www.weather.gov/wrh/climate?wfo=bou>.

⁶ Homelessness Services Data Dashboard, City of Boulder (Jan. 25, 2025), <https://bouldercolorado.gov/boulder-measures/homelessness-services>.

Boulder is not alone. Cities across Colorado have comparable ordinances on their books, and *Grants Pass* has encouraged their proliferation. At least ten cities in Colorado, including Aurora, Greeley, Lakewood, Colorado Springs, and Grand Junction, adopted new or expanded bans in the decision's wake.⁷ Montrose now mandates at least ten days in jail for anyone cited three times under its camping ban.⁸ Boulder's main shelter recently reinstated a policy restricting admission for those without six months' prior local residency, only exacerbating the constitutional concerns with its bans.⁹

This case asks whether the Colorado Constitution provides any guardrails on the enforcement of such laws against people who are involuntarily unhoused. Particularly post-*Grants Pass*, that is a question of profound importance. For Coloradans facing homelessness, it bears on

⁷ Two Years Since Grants Pass: Tracking the Criminalization of Homelessness Across US Cities, ACLU (June 24, 2025), <https://www.aclu.org/two-years-since-grants-pass-tracking-the-criminalization-of-homelessness>.

⁸ Montrose Code § 6-1-10(E)(3).

⁹ Brooke Stephenson, *Boulder's Main Homeless Shelter Will Limit Stays for People Without Local Ties* (Apr. 14, 2016), <https://boulderreportinglab.org/2026/04/14/boulders-main-homeless-shelter-will-limit-stays-for-people-without-local-ties/>.

their dignity, survival, and right to exist in the place they call home. More broadly, it implicates basic premises of our system of criminal punishment, including whether the constitution tolerates the criminalization of conduct that is not volitional, blameworthy, or harmful; the effective banishment from our cities of a disfavored group; and the active endangerment of citizens living in extreme poverty because seeing their means of survival make others uncomfortable. These issues deserve this Court’s careful consideration.

If the Court declines review, there will not soon be another opportunity to weigh in, and in the meantime, unhoused residents will face an amplified web of laws that target their existence statewide and “cause a destabilizing cascade of harm.” 603 U.S. at 568 (Sotomayor, J., dissenting). The decision below “lays the groundwork for a ‘not-in-my backyard’ domino effect.” *Ryals v. City of Englewood*, 2016 CO 8, ¶ 59 (Hood, J., concurring in part and dissenting in part). “No longer hindered by the prospect of viable lawsuits, the remaining metro-area cities now have every incentive to pass” ordinances like—or worse than—Boulder’s. *Id.* at ¶ 66.

Other states' courts are wrestling with these issues under their own constitutions on actual records. *See, e.g., Williams v. Albuquerque*, Order Denying City of Albuquerque's Motion for Partial Judgment on the Pleadings, No. D-202-CV-2022-07562 (Bernalillo Dist. Ct. March 18, 2025) (rejecting application of *Grants Pass* to decide state constitutional claims and permitting plaintiffs to proceed to discovery on cruel and unusual punishment and due process theories, including state-created danger); *Currie v. City of Spokane*, Order Denying Defendants' Motion to Dismiss, No. 23-2-03708-32 (Wash Super. Ct. Nov. 18, 2024) (denying motion to dismiss plaintiffs' cruel and unusual punishment and due process claims under Washington Constitution); *Duncan v. Portland*, Opinion & Order on Plaintiffs' Motion for a Preliminary Injunction, No. 23CV39824 (Multnomah Cir. Ct. Nov. 9, 2023) (granting preliminary injunction under state constitution); *Mahelona v. Honolulu*, Findings of Fact, Conclusions of Law and Order on Plaintiffs' Motion for Preliminary Injunction, No. 1CCV-23-0000972 (Haw. Cir. Ct. Jan. 3, 2024) (denying preliminary injunction under state constitution). By affirming dismissal

under C.R.C.P. 12(b)(5) in a published decision, the court of appeals short-circuited that chance for Colorado.¹⁰

The court of appeals' decision was deeply wrong. But either way, this Court should not let a single division's decision countenancing laws three justices of the U.S. Supreme Court have called "unconscionable and unconstitutional" settle these matters for Colorado's foreseeable future.

II. The decisions below reflect the need for guidance on lower courts' "responsibility to engage in an independent analysis of state constitutional principles."

Both lower courts recited this Court's instruction that the Colorado Constitution must be independently construed. But both refused to perform that analysis without a precedent from this Court expressly authorizing departure from federal jurisprudence. *See Feet Forward*, ¶¶ 25-36 (following *Grants Pass* because this Court "has not interpreted section 20 as providing greater protections than those afforded by the Eighth Amendment"); CF, pp.728, 789 (concluding that because no

¹⁰ Even constitutional defenses asserted in municipal court would be nonstarters under *Feet Forward* and unlikely ever to reach this Court's limited docket if appealed.

precedent provided “discretion to interpret Art. II, §20 more broadly,” its job was not to question “whether *Grants Pass* was correctly decided”).

First, as Petitioners argued below, Op. Br. at 10-21, that condition is met here. Indeed, it was in reference to the cruel and unusual punishments clause that this Court instructed that even an identical federal provision “does not abrogate our responsibility to engage in an independent analysis of state constitutional principles in resolving a state constitutional question.” *People v. Young*, 814 P.2d 834, 842 (Colo. 1991).

More importantly, the lower courts’ approach inverts the required analysis. This Court has repeatedly reaffirmed the duty to construe the state constitution independently, *e.g.*, *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 34, and instructed that federal jurisprudence may be followed where, based on that “independent analysis,” a court finds “the U.S. Supreme Court’s reasoning to be sound,” *id.* at ¶ 38. State courts encountering questions of first impression under the Colorado Constitution should not need to justify diverging from federal

jurisprudence; they should need a reason to mirror it. Federal decisions may be persuasive authority – but only if they persuade.

The lower courts’ contrary view, under which the responsibility of independent analysis falls to this Court alone, leaves every novel state constitutional claim dead on arrival in Colorado’s trial courts. That result squares neither with this Court’s instructions on state constitutional interpretation nor its admonition that courts must be “wary of dismissing a case where the pleadings show that an alleged violation of a constitutional right is at issue.” *Davidson v. Dill*, 503 P.2d 157, 162 (Colo. 1972).

The lower courts’ abdication is especially dangerous here because *Grants Pass* was a sharp departure from prior federal jurisprudence. It cast the rule announced in *Robinson*—the very case that incorporated the cruel and unusual punishments clause against the states—as an outlier. It undermined the long-settled understanding, including in Colorado, that the clause “imposes substantive limits on what can be made criminal and punished as such.” *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 217 (Colo. 1984) (quoting *Ingraham*, 430 U.S. at 667). And it relied on a false

distinction between status and conduct to effectively overturn *Robinson* without meaningfully addressing its abdication of *stare decisis*.

By asking only whether this Court had historically construed section 20 more broadly, the lower courts failed to grapple with the incongruity of *Grants Pass* itself with this Court's precedents. *See, e.g., Arnold v. City & Cty. of Denver*, 464 P.2d 515, 516-17 (Colo. 1970) (striking down vagrancy ordinance and recognizing that punishing status is unconstitutional); *Boe v. Children's Hosp. Colorado*, 2026 CO 32, ¶ 55 (recognizing that status and conduct can be inextricably intertwined). They failed to consider that past reliance on federal analysis may not have reflected an interest in consistency for consistency's sake, but this Court's conclusion that federal reasoning of the time was sound. They also failed to construe article II, section 20 in light of the state constitution "as a whole." *Havens v. Bd. of Cnty. Comm'rs*, 924 P.2d 517, 523 (Colo. 1996).

Other state high courts have offered guidance to help lower courts evaluate new federal precedent. They instruct courts to consider whether the decision sharply departs from earlier precedent, retrenches on Bill of

Rights protections, or limits rights in a manner inconsistent with the spirit of earlier opinions. *See, e.g., Kahn v. Griffin*, 701 N.W.2d 815, 828-29 (Minn. 2005); *People v. Teresinski*, 640 P.2d 753, 760-61 (Cal. 1982); *see also Granillo v. State*, --- P.3d ----, 2026 WL 2085397, at *29 (Haw. July 15, 2026) (“When six justices walk away from those they are supposed to protect, state constitutions hold the line.”); *Sitz v Dep’t of State Police*, 506 N.W.2d 209, 763 (Mich. 1993) (“[O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government.”). Such instruction helps fulfill the design of dual sovereignty and of states as independent “bulwarks of freedom” in our constitutional system.¹¹ This Court should grant review to provide like guidance so that the meaning of the Colorado Constitution does not silently follow wherever federal law goes, even when it upends pillars of prior jurisprudence.

¹¹ Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 179 (2018).

III. The court of appeals opinion rests on a fiction rather than the well-pleaded facts, rejects claims not asserted, and strays from this Court’s precedents.

The court of appeals got this case wrong. Its fundamental mistake was to privilege over the well-pleaded facts the *Grants Pass* majority’s fiction that an ordinance criminalizing the defining features of homelessness is distinct from an ordinance criminalizing homelessness. That false premise underlies the entire opinion. But fiction cannot sustain withholding the protections of the Colorado Constitution from a deeply vulnerable group. If the challenged laws are to be upheld, let the decision be based on fact.

The panel saw the problem itself. At oral argument, it acknowledged that the Blanket Ban is “pretty plainly targeting the unhoused,” and that while it might “be phrased to get at conduct, . . . in the end, it’s about status,” likening it to the adage that “a tax on Yarmulkes is a tax on Jews.”¹²

¹² Oral Argument at 21:20, *Feet Forward* (Apr. 7, 2026), <https://www.coloradojudicial.gov/topic/77/court-appeals-oral-arguments>.

Asked to explain why the ordinance is not “targeting status in disguise,” Respondents’ counsel tellingly answered only that an involuntarily unhoused person can still “sit[] in a park, sit[] on a park bench, walk[] around.”¹³ Counsel did not—and could not—explain how the person could remain in Boulder without necessarily violating the ordinance because of their status.

Neither does the opinion below. It acknowledges the “tension” in “differentiating between a person’s conduct and status when their conduct involves basic activities for survival due to an involuntary status.” *Feet Forward*, ¶ 41. But it affirms dismissal because the court cannot “conclude that the status of homelessness is involuntary in all instances” and because, as in *Grants Pass*, “it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest.” *Id.* at ¶¶ 41-43 (quoting 603 U.S. at 546).

That reasoning answers the wrong question. Petitioners do not bring a facial challenge. The fact that it “makes no difference” to

¹³ *Id.* at 21:58.

Respondents whether a person’s status makes the prohibited conduct unavoidable is precisely the problem, not the scheme’s saving grace. Whether homelessness is involuntary “in all instances” is also therefore beside the point. The complaint alleged that Respondents enforce the law even against those who *are* involuntarily unhoused, as they did against the individual plaintiffs, and Petitioners challenge only that enforcement.

The court engaged in no review of the legal sufficiency of the claims based on the facts alleged as to the individual plaintiffs. It merely declared that “reasonable minds can disagree on this point of status versus conduct” and then rejected Petitioners’ complaint outright—an outcome appropriate under C.R.C.P. 12(b)(5) only where a claim is implausible. By tethering its ruling to *Grants Pass* rather than the complaint, the court wrongly deprived Petitioners—and future potential plaintiffs with different facts—of the opportunity to prove that they *were* involuntarily unhoused and that Respondents’ enforcement includes unconstitutional applications.

This Court should grant review because unhoused residents deserve an answer to the actual question presented, which is whether the Colorado Constitution tolerates enforcement of the ordinances where, in fact, because of a person's status, "[t]he only way to comply . . . is to leave" the city altogether. 603 U.S. at 575 (Sotomayor, J., dissenting).

The same fiction infected the court's treatment of Petitioners' remaining claims. Petitioners alleged that, as applied, the ordinances unjustifiably burden the rights of involuntarily unhoused individuals to use the public streets without interfering with the rights of others. CF, pp.4-21 This Court recognizes that right as fundamental:

[T]he rights of freedom of movement and to use the public streets and facilities in a manner that does not interfere with the liberty of others are basic values inherent in a free society and are thus protected by article II, section 3 of the Colorado Constitution Because these liberty interests are fundamental, the state must establish a compelling interest before it may curtail the exercise of such rights.

J.M., 768 P.2d at 221.

The court of appeals rejected the claim on the basis that section 3 "doesn't state that there is a fundamental right to shelter on public land to sleep and rest," observing that no one has challenged state laws that

regulate recreational camping. *Feet Forward*, ¶ 53 & n.7. That comparison exposes a profound misapprehension of the claim. *Cf. Lawrence v. Texas*, 539 U.S. 558, 566-67 (2003) (explaining that the overruled *Bowers v. Hardwick* decision had “misapprehended the claim of liberty there presented to it,” as reflected in that decision having framed the question before it as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”). Enforcing criminal laws to target acts of survival of a disfavored group city-wide is not akin to creating general rules to manage recreation outside. As applied, the bans effectively exclude people who are involuntarily unhoused from living lawfully within Boulder’s city limits. CF, pp. 2, 24-25.

The court then declared that section 3 is not implicated because “occupying public property to shelter for sleep and rest necessarily interferes with every other resident’s ability to traverse, use, and enjoy that same space.” *Feet Forward* at ¶ 53. That assumption directly contradicts the complaint, which alleged that the individual plaintiffs were ticketed when they were not interfering with anyone’s liberty.

CF, p.20. And it conflicts with *J.M.* itself, where this Court had no trouble concluding that an ordinance prohibiting “standing around, hanging out, sitting, kneeling, sauntering or prowling” *implicated* the right. 768 P.2d at 221; see *People in Interest of M.C.*, 774 P.2d 857, 862 (Colo. 1989) (describing the *J.M.* ordinance as restricting minors’ ability “to remain on the public streets of the city”). Other courts have widely agreed that the right to freedom of movement includes the right to remain. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) (“[I]t is apparent that an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is ‘a part of our heritage.’”); Op. Br. at 26-28.

Boulder’s ordinances are not written or enforced to target interference with the rights of others. They target “activities of daily living” and “protection from the elements.” Whether their breadth and severity are justified by or tailored to sufficiently important government interests are questions Petitioners should have the chance to test on the evidence. See, e.g., *Commonwealth v. Weston*, 913 N.E.2d 832 (Mass. 2009) (upholding curfew for minors under state freedom of movement

provision but concluding criminal penalties were not “least restrictive means” to achieve government interest and were therefore unconstitutional).

Finally, the court of appeals rejected Petitioners’ narrow danger-creation claim solely because the complaint does not allege that the ultimate harm comes from a third-party private actor. *Feet Forward*, ¶ 71. The state-created danger doctrine recognizes that the government violates due process when it fails to protect a person from harm in circumstances where it either created the danger that caused the harm or made the individual more vulnerable to it. *Henderson v. Gunther*, 931 P.2d 1150, 1156 (Colo. 1997). Respondents actively create or at least increase the vulnerability of unhoused residents to danger when they impose criminal sanctions for using cover from the elements that is necessary to avoid immediate harm.

Language in the case law referring to private actors stems from the doctrine’s context as an exception to the state action doctrine, which usually recognizes constitutional injuries caused only by the government itself. *Id.* at 1155. The private harm is what makes the due process claim

questionable. It is illogical to extrapolate from this case law that private harm is a necessary ingredient. If the government can be liable for exposing someone to danger inflicted by a third party, it should not be impossible to state a claim where the government affirmatively places someone in direct, known danger, where causation is necessarily more proximate. This Court should not adopt such a rule.

Regardless of this Court's view of the outcome the court of appeals reached on the merits, Petitioners ask that it grant review so that the controlling law on these matters does not rest on a legal fiction but engages independently and meaningfully with the reality of being unhoused in Boulder (and the well-pleaded allegations of the complaint).

IV. This case is the right vehicle for addressing the issues presented.

For several reasons, this case provides the ideal vehicle for certiorari review. First, because this appeal arises from a dismissal under C.R.C.P. 12(b)(5), it presents pure questions of law.

Second, the well-pleaded allegations frame the legal issues cleanly. Each individual plaintiff was involuntarily unhoused when criminalized. CF, pp.17-21. Boulder is unaffordable and has inadequate shelter for its

unhoused residents. CF, pp.5-7. Its scheme is extreme: it punishes conducting “activities of daily living” while using “any cover or protection from the elements” beyond clothing, on all public property, with criminal penalties including incarceration. B.R.C. §5-6-10(d). Respondents enforce the bans almost exclusively against unhoused residents, even in dangerous weather. CF, pp.11-14. And Boulder cites people under its bans more than every other Colorado city combined. CF, p.12.

Third, Petitioners’ claims are tailored, as-applied challenges. They concern only enforcement against involuntarily unhoused individuals. The Tent Ban and danger-creation claims are narrower still, concerning enforcement only when the criminalized cover is necessary to avoid immediate danger from the elements.

These features leave the Court ample room to resolve the issues presented while preserving local governments’ ability to regulate public space in ways that do not infringe constitutional rights.

Fourth, the state constitutional arguments here are no afterthought. From the beginning, Petitioners asserted their claims under the Colorado Constitution alone. CF, pp.22, 495. The “distinctive state-specific

factors” that compel independent interpretation, *People v. McKnight*, 2019 CO 36, ¶ 40, were robustly briefed below, including with the support of amici historians who explained why ordinances banning the use of shelter on public land would have shocked the framers of a state settled under tents and temporary structures. Br. of Amicus Curiae Historians in Support of Plaintiffs-Appellants; *see also People v. Schafer*, 946 P.2d 938, 942-43 (Colo. 1997) (“tak[ing] notice” in constitutional analysis “that tents have long been utilized as temporary or longer term habitation in Colorado”).

Finally, granting review harms no one. There is no injunction in place. Even reversal of the court of appeals would mean only that the Petitioners’ claims and Respondents’ defenses may be tested on the evidence. This Court should press pause on the extreme ramifications of the court of appeals’ opinion, grant the petition, and give these questions the consideration they are due.

CONCLUSION

This case presents questions of first impression that carry profound consequences for unhoused residents and cities statewide. The issues

deserve consideration based on the facts alleged and under an independent analysis of the Colorado Constitution, not by default to a federal decision built on a fiction. Because this is the right vehicle and the right time for certiorari review, Petitioners respectfully request that the Court grant the petition.

Respectfully Submitted,

Date: July 23, 2026

A handwritten signature in black ink, appearing to read 'A. Kurtz', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2026, I served a true and correct copy of the foregoing document to all counsel of record via the Colorado Courts E-Filing System.

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